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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-808

GORDON M. AMBACH, as Commissioner of Education of the State of New York,

VINCENT GAZZETTA, as Director of the Division of Teacher Education and Certification of the Education Department of the State of New York, and

ROBERT ASHER, as Director of the Division of Professional Conduct of the Education Department of the State of New York,

Appellants,

—against—

SUSAN M. W. NORWICK,

Appellee,

TARJA U. K. DACHINGER,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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Other Authorities

Academic Freedom in the Public Schools: The Right to Teach, 48 N.Y.U.L. Rev. 1176 (1973) . . . 33
Carliner, The Rights of Aliens (Avon/Discus, 1977) 34, 57
Easton & Hess, "The Child's Political World," 6 Midwest J. of Political Science 229 (1962) 75
Emerson, The System of Freedom of Expression (1970) 94
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Hess & Torney, The Development of Political Attitudes In Children (1967) 65, 75
Jennings and Niemi, The Political Character of Adolescence: The Influence of Families and Schools (1974) 66, 75
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G. Stephenson, A History of American Immigration 1820-1924 (Althenium, 2d ed., 1964), ...7, 15, 57

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OPINION BELOW

The unanimous opinion of the three-judge court is reported at 417 F.Supp. 913 (SDNY 1976) and is reprinted in the Appendix hereto at A 35-53. References herein will be to the Appendix.

QUESTIONS PRESENTED

1. Should Education Law § 3001(3), which limits certification of public school teachers to citizens or aliens who have declared an intent in the future to become citizens, be closely scrutinized because it discriminates against a suspect class or abridges the fundamental rights to academic freedom or to work in the common occupations of the community?

2. Is § 3001(3) narrowly drawn and necessary to achieve a compelling state interest?

3. Is § 3001(3) void under the Supremacy Clause becasue it is inconsistent with both general and specific federal laws regarding the immigration, residence and employment of alien teachers?

4. Does § 3001(3) deny alien teachers due process by creating an irrebuttable

factual presumption that they are unqualified to teach, and by authorizing exceptions within the standardless descretion of the Commissioner of Education?

STATEMENT OF THE CASE

A. Introduction.

In the case of In Re Griffiths, 413 U.S. 717 (1973), this Court ruled that a state could not on the basis of alienage exclude from admission to the bar a permanent resident alien who was "eligible for naturalization" but who had "not filed a declaration of intention to become a citizen" and had "no present intention of doing so." 413 U.S. at 718, n. 1. On the same day it decided Griffiths, this Court summarily affirmed Miranda v. Nelson, 351 F.Supp. 735 (D. Ariz., 1972), aff'd mem. sub nom. Nelson v. Miranda, 413 U.S. 902 (1973). Although the statute found unconstitutional in Miranda barred aliens from a broad range of public jobs, including teaching, one of the two named plaintiffs was specifically seeking employment as a teacher. 351 F. Supp. at 738.

In January of 1977, believing that Griffiths and Miranda governed disposition

of this appeal, and together precluded state efforts to limit public employment as a teacher to citizens or declarant aliens, Appellees filed a brief Motion to Affirm the decision below. Thereafter, the Court announced several important decisions on the rights of aliens, and on May 15, 1978, noted probable jurisdiction. 56 L.Ed.2d 400.

Because this appeal raises important issues that have closely divided the Court in recent months, Appellees will discuss those issues in more detail than they would otherwise consider appropriate.

B. The Facts.

The basic facts are not in dispute. Appellees Norwick and Dachinger are lawfully admitted permanent resident aliens. A 25. Both are married to United States citizens, and both have resided in the United States, and paid federal, state and local taxes for over a decade. A 25. Both received graduate degrees from New York universities. A 5, A 17. Both are qualified in all respects except alienage to teach in public schools in New York. A 26.

Appellee Susan Norwick was born in Dundee, Scotland, and is a citizen of Great Britain. A 49. She has resided in the

United States since 1965, A 6, A 49, and has been married to a United States citizen since 1966. A 5.[1] She is a graduate of North Adams State College in Massachusetts, where she received a B.A. degree summa cum laude. A 5. At the time of the hearing below she was a straight-A graduate student in Developmental Reading at the State University of New York at Albany. A 49. She has since earned an M.S. degree in Developmental Reading at SUNY-Albany, with a straight-A average.

In 1960-61 Appellee Norwick taught in primary schools in Edinburgh, Scotland; from 1961-1965 she taught at the Mount School in London, England; from 1965-1967 she was an editor of The Reading Laboratory in New York City; and for six years, from 1967-1972, she taught at the Riverside Elementary School, a private school in New York City. A 5.

1/ Although the record is silent on the precise dates, Appellee Norwick was admitted to permanent resident status on August 3, 1965, more than thirteen years ago, has resided in the United States since that date, and was married on December 11, 1966. Her husband has been a practicing attorney in New York since 1965.

Appellee Tarja Dachinger was born in Turku, Finland, and remains a citizen of that country. A 17. She graduated from Lehman College, a unit of the City University of New York, where she received a B.A. degree cum laude and an M.S. degree in Early Childhood Education.[2] She was married to a United States citizen in 1966 and has resided in this country since then. A 17-18. She was employed as a teacher during 1966, 1967 and 1970 at the Victory Day Care Center in New York City. A 17.

In short, both Appellees have superior academic qualifications to teach in New York's public schools. Both have taught in schools in New York with untarnished records, and both have advised the state they are willing to subscribe to the oath to support the state and federal constitutions required of all public school teachers by Education Law § 3002. A 25.

2/ It is ironic, and little short of irrational, that Appellants are attempting to prevent Appellees from using on the state's behalf precisely those skills they acquired at institutions of higher education in New York, in programs supported in whole or in large part by state funds. Presumably, a chief reason for such subsidization is that such higher studies "in the long run will be a benefit to the State." Nyquist v. Mauclet, 432 U.S. 1, 13-14 (1977) (Burger, C.J., dissenting).

Appellees applied for certificates to teach in public schools in New York. A 26. Their applications were denied by Appellants and their predecessors on the basis of alienage, pursuant to New York Education Law § 3001(3). A 26.

C. The Statutory Scheme

The text of the relevant statutes and regulations is set forth in the opinion below, A 49-50, and in the Appendix to Appellants' Brief. The principal statute, Education Law § 3001(3), provides as follows:

> "Qualifications of Teachers
>
> "No person shall be employed or authorized to teach in the public schools of this state who is:
>
> * * *
>
> "3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed, provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen. The provisions of this subdivision shall not apply, after July first, nineteen hundred sixty-seven, to an alien teacher emplcyed pursuant to regulations adopted by the commissioner of education permitting such employment."

Section 3001(3) has three clauses. The first, which requires that public school teachers be citizens, was adopted in 1918, (Appellants' Brief at 7), a time of intense hostility towards aliens.[3/]

The second clause, enacted in 1922 (Appellants' Brief at 7), provides that public school teachers do not have to be citizens if they make "due application to become a citizen and thereafter within the time prescribed by law shall become a citizen." The application is made by filing with the federal government a "declaration of intention" to become a citizen, so teachers who qualify under this clause are commonly referred to as "declarant aliens." Those who would be eligible to file a declaration but have not done so are commonly referred to as non-declarant aliens. Not all aliens are eligible to file a declaration of intention. Only permanent resident aliens are eligible to file declarations of intention. If they are not married to a United States citizen, they must reside in the United States for five years before they

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3/ B. Schrieke, Alien Americans (Viking, 1936), pp. 78-80; G. Stephenson, A History of American Immigration 1820-1924 (Athenium, 2d ed., 1964), pp. 224-237.

are eligible to file a petition for naturalization.[4/] If married to a citizen, they must reside here three years before they can petition for naturalization.[5/] Even then it may take 1-2 years to complete the naturalization process.

The third clause of § 3001(3), adopted in 1967 (Appellants' Brief at 7), provides that the citizenship or declarant alien requirements "shall not apply" after July 1, 1967 "to an alien teacher employed pursuant to regulations adopted by the commissioner of education permitting such employment." The legislative history of the 1967 amendment is extremely sparse. Although Appellants assert that the third clause authorizes only "temporary" certificates (Appellants' Brief at 8), the wording of the statute contains no such limitation and there is no House or Senate report or floor debate to indicate the legislature intended such a limitation. For present purposes,

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4/ 8 U.S.C. § 1427.

5/ 8 U.S.C. § 1430(a)

however, it is unnecessary to decide whether the third clause authorizes permanent or only temporary certificates, because Appellant Norwick was denied even a temporary or provisional certificate (Appellants' Brief at 4; A 6-7; A 26.)

The important point, for present purposes, is that the third clause of § 3001(3) clearly authorizes the commissioner of education to issue at least a temporary certificate to a non-declarant alien, even if the alien would be eligible to file a declaration of intent. The succeeding statute, Education Law § 3001-a (A 49), adopted in 1965 (Appellants' Brief at 7), already authorized temporary certificates for aliens who were not permanent resident aliens and thus not eligible to file declarations of intent.

Other relevant statutes require that both citizens and those aliens who are permitted to teach in public schools take an oath to support the federal and state constitutions. Education Law §§ 3001-a and 3002. As noted, Appellees have offered to take that oath.

Education Law § 2590-c, adopted in 1969,[6/] authorizes aliens to vote for

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6/ New York Laws, 1969, ch. 330, Art. 52-A.

and serve as members of community school boards, which hire and fire teachers, set curriculum, and govern the public schools. See A 27-32 and discussion infra, Point II, B.2.

SUMMARY OF ARGUMENT

Education Law § 3001(3) should be closely scrutinized because it discriminates against aliens, a suspect class. Point I.A. The Court's ruling in Nyquist v. Mauclet, 432 U.S. 1 (1977), that non-declarant aliens are a suspect class, governs the standard of review applicable here. I.A.1. The "political community" exception to strict scrutiny announced for police officers in Foley v. Connelie, 55 L.Ed.2d 287 (1978), is inapplicable to the facts of this case because, under New York law, teachers are not part of the political community. I.A.2. Furthermore, teachers do not share as many of the characteristics of police officers as do attorneys, and attorneys do not come within the political community exception. In Re Griffiths, 413 U.S. 717 (1973). I.A.2.

Strict scrutiny is also required because the statute abridges the fundamental rights of academic freedom (I.B.), and the right to work in the common occupations of

the community. I.C.

Education Law § 3001(3) does not promote a substantial state interest (II.A.), and is not necessary. II.B.2. The New York legislature has disclaimed any interest in excluding alien teachers from public schools (II.B.1.), and has even authorized aliens to govern public schools. II.B.2. New York permits non-declarant aliens to teach in private schools, which shows that declarant status is not necessary to insure that students learn democratic principles. II. B.3. The oath to support the constitution, required by the legislature even for citizen teachers, satisfies any legitimate state interest in loyalty, and Appellees are willing to take that oath. II.B.4. The experience of other states shows that § 3001(3) is not necessary. II.B.5. Indeed, § 3001(3) does not even rationally advance a legitimate state interest. II.B.6.

Section 3001(3) is inconsistent with settled principles of education and academic freedom. II.C.

The statute is not narrowly or precisely drawn. It is both underinclusive and overinclusive, and prohibits an alien from any country from teaching any subject

at any grade level. II. D.

Section 3001(3) is void under the Supremacy Clause because it is inconsistent with both general and specific federal laws regulating the employment of alien teachers. III.

Section 3001(3) violates the due process clause because it creates an irrebuttable factual presumption that non-declarant aliens are not qualified to teach, and because it authorizes exceptions to be granted or withheld within the standardless discretion of Appellants. IV.

ARGUMENT

I. EDUCATION LAW §3001(3) SHOULD BE REVIEWED UNDER A STRICT STANDARD WHICH PLACES ON THE STATE A HEAVY BURDEN OF JUSTIFICATION.

This Court has required strict scrutiny when a statute either discriminates against a suspect class or abridges a fundamental right. Education Law §3001(3) does both. It discriminates against aliens, a suspect class, and abridges two fundamental rights, the right to academic freedom and the right to work in the common occupations of the community. Accordingly, there are three reasons for subjecting this statute to close

judicial scrutiny.

A. Section 3001(3) Should Be Subjected To Strict Scrutiny Because It Classifies Teachers on The Basis of Alienage, A Suspect Classification.

The reference to "person" in the Fourteenth Amendment's Equal Protection Clause includes aliens. Graham v. Richardson, 403 U.S. 365, 371 (1971). "Once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 309, n. 5 (1970), quoting from Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring).

> "All persons lawfully in this country shall abide in any state on an equality of legal privileges with all citizens under non-discriminatory laws." Takahashi v. Fish & Game Commission, 334 U.S. 410, 420 (1948).

This Court has held, without dissent, that

> classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular

minority" (see United States v. Carolene Products Co., 304 U.S. 144, 152, 153 n. 4 (1938)) for whom such heightened judicial solicitude is appropriate.

Graham v. Richardson, 403 U.S. at 372.7/

The Court has recognized at least three separate grounds for determining whether a classification is suspect. The Court will inquire whether the class "is...saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973) (emphasis added). It is not necessary that the class qualify as suspect under all three grounds. Blacks, for example, are a suspect class even though they can now vote and are no longer politically powerless. But aliens qualify as a suspect class under all three grounds.

7/ See, to the same effect, Nyquist v. Mauclet, 432 U.S. 1 (1977); Sugarman v. Dougall, 413 U.S. 634 (1973); Examining Board v. Flores de Otero, 426 U.S. 572 (1976); and In re Griffiths, 413 U.S. 717 (1973).

First, aliens are saddled with disabilities, both de jure and de facto. The very word alien is stigmatizing and is often used pejoratively.8/

Second, aliens have been subjected to a history of purposeful unequal treatment.9/

8/ The stigma attached to alienage is not a forgotten remnant of the past. As recently as 1973 a city in New York sought, unsuccessfully, to prohibit aliens from driving taxicabs on the ground that aliens "may be more inclined than citizens to avail themselves of the opportunity to partake or promote criminal activities." Sundram v. City of Niagara Falls, 7 Misc. 2d 1002, 1005, 357 N.Y.S. 2d 943,946 (Sup. Ct. 1973), aff'd mem., 44 App. Div. 2d 906, 356 N.Y.S. 2d 1023 (4th De't 1974). See also, Raffaelli v. Committee of Bar Examiners, 7 Cal. 2d 288, 291, 496 P. 2d 1264, 101 Cal. Rptr. 896 (1972) (en banc).

9/ See, e.g., the cases cited in Sugarman, 413 U.S. at 644 & n. 11 (1973). See also M. Konvitz, The Alien and the Asiatic in American Law, Ch. 6 (1946); and Schrieke and Stephenson, supra n. 3. The exclusion of aliens from nearly all forms of public employment in many states, including New York, during the beginning of this century was a direct consequence of their political powerlessness. See People v. Crane, 214 N.Y. 154, 108 N.E. 427, aff'd sub nom. Crane v. New York, 239 U.S. 195 (1915), where Justice Cardozo upheld a law forbidding aliens from holding public employment. The special "public interest" doctrine relied upon to uphold such discrimination was rejected in Graham v. Richardson, 403 U.S. 365 (1971).

Third, and most important, aliens are politically powerless. They cannot vote. Sugarman v. Dougall, 413 U.S. at 648; Skafte v. Rorex, 553 P. 2d 830 (Colo. 1976), appeal dismissed, 430 U.S. 961 (1977). And because they do not have the opportunity to trade political support, they are "shut out" of the political process.10/

To justify a suspect classification the state must demonstrate that its purpose or interest is constitutionally permissible and substantial, and that the classification is "necessary...to the accomplishment" of its purpose or the safeguarding of its interest. In re Griffiths, 413 U.S. at 721-722. See also, Examining Board v. Flores de Otero, 426 U.S. at 605. Although the state interest required to satisfy the strict scrutiny standard has been variously characterized as "overriding," McLaughlin v. Florida, 379 U.S. 184, 196(1964); "compelling," Graham v. Richardson, 403 U.S. at 375; "important," Dunn v. Blumstein, 405

10/ See generally, G. Rosberg, "The Protection of Aliens From Discriminatory Treatment By The National Government," The Supreme Court Review, 275 at 304 and n. 116 (1977).

U.S. 330, 343 (1972); or "substantial," In re Griffiths, 413 U.S. at 722, this Court has indicated that "no particular significance" is to be attached to these differences in articulating the test. Griffiths, 413 U.S. at 722, n. 9. What the Constitution demands is that

> The government interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn. Examining Board v. Flores de Otero, 426 U.S. at 605.

Appellants offer only two contentions why the strict scrutiny standard should not be applied in this case. First, they contend that because some alien teachers can remove themselves from the suspect class by filing a declaration of intent to become a citizen, the "principal basis" for strict scrutiny is not presented. Appellants' Brief at 18-19. Second, they contend that a test of reasonableness is sufficient because §3001(3) is necessary "to preserve the basic conception of a political community." Foley v. Connelie, ___U.S. ____, 55 L. Ed. 2d. 287, 292 (1978), quoting

Sugarman v. Dougall, 413 U.S. at 647. Appellants' Brief at 18. The first contention has been both implicitly and explicitly rejected by this Court. The second is inapplicable to the facts of this case.

1. If a classification burdens only aliens, the classification is suspect even if class members can by their voluntary act remove themselves from the disadvantaged class.

Appellants are seeking to reargue the precise point raised and rejected in Nyquist v. Mauclet, 432 U.S. 1, (1977). In effect, they ask the Court to overrule Mauclet. There, the same attorneys, representing the same Commissioner of Education named as a defendant below, argued that aliens who are disadvantaged by a statute unless they declare their intention to become citizens should not be considered a suspect class. That argument was explicitly rejected in Mauclet, and Appellants have advanced no reason why that case, decided less than fifteen months ago, should be overruled.11/

11/ See also, Matthews v. Lucas, 427 U.S. 495, 504 n. 11 (1976); and see, Monell v. New York City Dept. of Social services, 56 L.Ed.2d 611, 650-653 (1978) (Rehnquist, J., dissenting).

Here, as in Mauclet, "the important points are that [the statute] is directed at aliens and only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against a class." Mauclet, 432 U.S. at 9.

Further, as the Court noted in Mauclet, Appellants' position was implicitly rejected in several alienage cases dating back to 1973.12/

12/ "Our Brother Rehnquist argues in dissent that strict scrutiny is inappropriate because under §661(3) a resident alien can voluntarily withdraw from disfavored status. But this aspect of the statute hardly distinguishes our past decisions. By the logic of the dissenting opinion, the suspect class for alienage would be defined to include at most only those who have resided in this country for less than five years, since after that time, if not before, resident aliens are generally eligible to become citizens. 8 USC §1427(a) [8 USCS §1427(a)]. The Court has never suggested, however, that the suspect class is to be defined so narrowly. In fact, the element of voluntariness in a resident alien's retention of alien status is a recognized element in several of the Court's decisions. For example, the Court acknowledged that Griffiths involved an appellant who was eligible for citizenship, but who had not

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Essentially, §3001(3) imposes a political loyalty test on aliens that is not imposed on citizens. If the statute provided that black teachers, but not white teachers, would have to take a political loyalty oath, the statute would create a suspect class even though all black teachers could voluntarily remove themselves from

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filed a declaration of intention to become a citizen, and had 'no present intention of doing so.' 413 U.S., at 718 n. 1, 37 L.Ed.2d 910, 93 S. Ct. 2851. And insofar as the record revealed, nothing precluded the appellees in Sugarman v. Dougall from applying for citizenship. 413 U.S. at 650, 37 L.Ed. 2d 853, 93 S. Ct. 2842 (Rehnquist, J., dissenting). Mr. Justice Rehnquist argued in dissent there, just as he does here today, that strict scrutiny was inappropriate in those cases because there was nothing to indicate that the aliens' status 'cannot be changed by their affirmative acts.' Id., at 657, 37 L.Ed.2d 853, 93 S. Ct. 2842. Nonetheless, the Court applied strict scrutiny in the cases. We see no reason to depart from them now." Mauclet, 432 U.S. at 9, n. 11.

the disadvantaged class by taking the oath.13/

Similarly, even if a suspect class is not involved, statutes which burden a fundamental right (see Points I.B. and I.C. infra)will be strictly scrutinized even though all members of the disadvantaged class can voluntarily remove themselves from the class. Thus, a statute requiring that all teachers be protestants would be strictly scrutinized, even though all non-protestant teachers could renounce their religions and voluntarily become protestants.

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13 See to the same effect in an analogous context, Rosberg, supra n. 10 at 290 (1977):

> "It is simply not correct to say that the discrimination is within the class of aliens rather than between citizens and aliens. The statute imposes on all aliens a qualification for admission to the program that is applicable to no citizen, a requirement that they demonstrate their "affinity" with the United States by proving that they have been admitted to the United States for permanent residence and have resided here for five years. Even though some aliens can satisfy the additional qualification, the fact remains that all aliens are judged under a distinct standard. If the statute governing eligibility in the insurance program imposed a durational residence requirement on blacks but not on whites, the Court could not avoid

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Thus, both stare decisis and cogent reasons compel rejection of Appellants' oft-rejected argument on this point.14/

> strict scrutiny on the theory that, since some blacks will satisfy the extra requirement, the discrimination is really within the class of blacks."

14/ Mauclet, though a 5-4 decision, is now the law of the land on this point. All lower court judges would now be required to apply a strict scrutiny standard when analyzing statutory discriminations against aliens, even if some aliens could remove themselves from the disadvantaged class by filing a declaration of intent to become a citizen. Appellees respectfully suggest that until Mauclet is overruled, the four justices who dissented in Mauclet (Mr. Chief Justice Burger, Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Rehnquist), have an "institutional duty" to apply the strict scrutiny standard to analysis of this statutory discrimination, and to all other statutes which discriminate against non-declarant aliens. As Mr. Justice Stewart ruled in Hudgens v. NLRB, 424 U.S. 507, 518 (1976): "It matters not that some Members of the Court may continue to believe that the Logan Valley case was rightly decided. Our institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be." (footnote omitted). Mr. Chief Justice Burger, Mr. Justice Powell and Mr. Justice Rehnquist joined in that opinion. See also, Gosa v. Mayden, 413 U.S. 665, 692 (1973) (Mr. Justice Rehnquist, concurring).

2. The "political community" exception is not applicable to the facts of this case.

This Court suggested in dicta in Sugarman, 413 U.S. at 648, and held in Foley, 55 L. Ed. 2d at 292-293, that exclusion of aliens from some positions necessary to preserve "the basic conception of a political community" is not suspect and will not require strict scrutiny. Under this exception to the general rule requiring strict scrutiny, certain rights than can, in general, be described as "political" rights, as opposed to "civil" rights, can be denied to aliens even if the state cannot show a compelling need for the denial.15/

The "political community" exception is important, but narrow. It permits a lower standard of review in alienage cases which involve "the qualification of voters," "persons holding state elective or important nonelective executive, legislative,

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15/ Appellees respectfully suggest that creating different standards of review for the same suspect class, depending on the nature of the position or right abridged, is unnecessary, blurs the distinction between the standard of review to be applied and the justification on the merits for the abridgement, and provides little guidance for lower courts. The Court could have

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and judicial positions," or "officers who participate directly in the formulation, execution, or review of broad public policy," because those rights and positions "go to the heart of representative government." Sugarman, 413 U.S. at 647 (emphasis added).

Given the sweep of anti-alien laws New York has enacted and defended, including laws requiring citizenship for veterinarians and masseurs, any claim that §3001(3) was enacted to preserve the "political community" should itself be closely scrutinized. See note 59 infra and accompanying text. In any event, the "political community" exception is not applicable to the facts of this case. None of the elements thought important in Sugarman or Foley is present in this case.

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ruled in Foley, supra, that a statute limiting the position of state police officers to citizens will be strictly scrutinized, and then ruled that the state does have a compelling need to limit that position to citizens. That approach would avoid the necessity of deciding, on the merits, whether a particular position or right falls within the "political community" exception before deciding the standard of review to be applied in deciding the merits.

Like all the positions which cannot be reserved for citizens,[16] and unlike those which can,[17] teaching is not a governmental monopoly. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

Furthermore, New York law is clear, in decisions by the courts and by the Attorney General, that teachers are "employees," not officers, and do not "exercise any sovereign power or discharge any judicial duties."[18] This authoritative construction of New York law should be sufficient to find that at least in New York, teachers are not considered so close to the heart of government as to come within the "political community" exception. But even apart from those constructions, teachers do not share the characteristics thought relevant in Foley.

16/ E.g., civil servants, Sugarman v. Dougall, supra, attorneys, In re Griffiths, supra; and engineers, Examining Board v. Flores de Otero, supra.

17/ Jurors, Perkins v. Smith, 370 F.Supp. 134 (D. Md. 1974); aff'd, 426 U.S. 913 (1976); voters, Skafte v. Rorex, supra; police officers, Foley V. Connelie, supra.

18/ As the Court stated in Matter of Corsall v. Gover, 10 Misc. 2d 664, 667-669, 174 NYS 2d 62, 65-66 (1958), a law prohibiting the

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holding of two "offices" did not prevent a teacher from simultaneously serving as Mayor:

> "Petitioner's position as a teacher had no earmarks of officialdom and it is totally lacking in official characteristics. ... A teacher does not exercise any sovereign power or discharge any judicial duties with respect to the functions and duties of the board in its control and management of the Public School System... [A] teacher [is] required and obliged to follow the curriculum established by the Board, to attend classes assigned to him...and to practice good behavior and to render efficient and competent service. ... [H]is employment is by contract with the Board. ... Above all...a teacher is under the supervision of the Superintendent...and the principal. ...
>
> This court is of the opinion that the position of teacher is not a public office. ... He is an employee of the board."

The Attorney General of the State of New York, who represents Appellants here, has repeatedly agreed, formally concluding on numerous occasions that teaching is not a public office, and that teachers are not officers, but employees. See e.g., 1963 Op. Att. Gen. 196 ("a school teacher is not a civil or public officer but an employee..."); 1967 Op. Att. Gen. 60 (same); 1975 Op. Atty. Gen. 230 and 281 (same); compare, 1975 Op. Atty. Gen. 100 (special patrolmen are officers, not employees).

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In Foley, the Court stressed that the police function is "one of the basic functions of government;" that police "exercise an almost infinite variety of discretionary powers;" that police "invade" the constitutionally protected "privacy" of individuals in "public places," private dwellings and on public highways in order to "search" and "arrest" individuals, often using "lawful force" and "weapons;" that abuse of police authority "can have serious impact on individuals;" that the police function is not one of the "common occupations of the community;" that police exercise "broad power over people generally;" and that "most states expressly confine the employment of police officers to citizens." Foley, 55 L. Ed. 2d at 293-294.

Apparently, other states also consider teachers to be employees, not officers. E.g., Michigan Attorney General Opinion No. 4925, Jan. 16, 1976: "Elementary and secondary school teachers are not 'officers who participate directly in the formulation, execution, or review of broad public policy.' Sugarman, supra. It would appear that the state, consequently, has no judicially recognized justification for the imposition of this broad citizenship requirement." See, to the same effect, the opinion of the Pennsylvania Attorney General quoted infra, n. 19.

In contrast, although education is extremely important, this Court has ruled it is not a fundamental right, or a mandatory function of government. San Antonio School District v. Rodriguez, 411 U.S. 1, 37 (1973).[19] The discretion of teachers is strictly limited by curriculum requirements and by the supervision of the superintendent and principal. Matter of Corsall v. Gover, supra n. 18. Teachers do not search or arrest individuals in public places, or private dwellings, and they do not carry weapons. Abuse of their authority does not have the same serious impact on life, limb or liberty that police abuse

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19/ See, to the same effect, 1973 Opinions of the Pennsylvania Attorney General 19, at 20 (Official Opinion No. 9, Jan. 16, 1973): "They [Supreme Court decisions] indicate that aliens may be barred from an occupational field only when loyalty and detailed familiarity with American culture are necessary qualifications for a position closely linked to uniquely governmental functions, such as the administration of justice or the conduct of foreign policy. ...Teaching, like medicine, is an important profession, but it is not a central governmental function like the operation of foreign policy or the administration of justice. These latter functions, for example, are never entrusted to private institutions as teaching often is in the United States."

can occasion.[20] Teaching is one of the common occupations of the community (see Point I. C. infra). Teachers exercise limited control over pupils in the classroom, but they do not exercise "broad power over people generally." Finally, "most states" do not limit the employment of teachers to citizens (see Point II. B. 5., infra).

Attorneys share more of the characteristics thought relevant in Foley than do teachers, but attorneys do not come within the "political community" exception. As the Court noted in Griffiths, in Connecticut lawyers were, by statute, "officers of the court"; they could invade individual privacy through issuance of subpoenas and compelled depositions; and they could even

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20/ In addition, the Court has previously noted that the "openness of the public school and its supervision by the community" affords significant safeguards against abuses by teachers of their pupils' rights. Ingraham v. Wright, 430 U.S. 651, 670 (1977). In contrast, of course, no similar protections surround the individual's encounter with a policeman on a public highway, or in private dwellings. Furthermore, a teacher's contact with pupils is almost always in the presence of other teachers, student teachers and teachers' aides.

"command the assistance" of peace officers. Griffiths, 413 U.S. at 723. Lawyers necessarily exercise very broad discretion; abuse of their authority can have severe consequences for their clients and for others; and the practice of law is a far less common occupation than is teaching. As Mr. Justice Powell, who authored the opinion in Griffiths, later wrote for the Court in In Re Primus, U.S. , 56 L. Ed. 2d 717, 428 (1978):

> "[T]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" [citing Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)].

Accordingly, if lawyers do not come within the "political community" exception, it follows a fortiorari that teachers do not.

Courts and attorneys general have subjected discriminations against teachers to strict scrutiny. In Miranda v. Nelson, 351 F.Supp. 735 (D. Ariz. 1972), for example, a three-judge court strictly scrutinized a statute that limited many jobs to

citizens, including the teaching job sought by one of the named plaintiffs. That decision was summarily affirmed by this Court. 413 U.S. 902 (1973). And in Younus v. Shabat, 336 F.Supp. 1137 (N.D. Ill. 1971), aff'd in an unpublished opinion, (7th Cir., Jan. 3, 1973, No. 72-1051), the courts strictly scrutinized restrictions on granting tenure to alien teachers.

Similarly, several Attorneys General have concluded that discriminations against alien teachers should be subjected to strict scrutiny.[21/]

B. Section 3001(3) Should Be Subjected to Strict Scrutiny Because It Abridges the Fundamental Right of Academic Freedom.

Even if §3001(3) were not subject to strict scrutiny on the ground that it embodies a suspect classification, it would

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21/ See, for example, California, 53 Op. Att. Gen. 63, Opinion No. 69-199, Feb. 6, 1970; New Jersey, Attorney General Formal Opinion No. 10, Sept. 23, 1974; Pennsylvania, 1973 Opinions of the Attorney General 19, Opinion No. 9, Jan. 16, 1973; and Michigan, Opinion No. 4925, Jan. 16, 1976. The Attorney General of Massachusetts has advised the Massachusetts Commissioner of

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be subject to strict scrutiny on First Amendment grounds. Section 3001(3) directly affects academic freedom, "which is of transcendent value to all of us and not merely to the teachers concerned," and thus must be justified by a compelling state interest. Keyishian v. Board of Regents, 385 U.S. 589, 603-604 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960); Sweezy v. New Hampshire 354 U.S. 234, 250 (1957). See also Pickering v. Board of Education, 391 U.S. 563 (1968); Epperson v. Arkansas, 393 U.S. 97 (1968).

As Appellees will demonstrate infra, Point II. C., the "paramount" objective of academic freedom is to insure a "robust exchange of ideas." Regents of the University of California v. Bakke, _____U.S._____, 57 L. Ed. 2d 750 at 786 (1978) (Powell, J.). For that reason, this Court has closely

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Education that "the citizenship provisions of the teachers' certification statute are unconstitutional," without describing the standard of review applied. Letter of Oct. 29, 1974 from Walter H. Mayo III, Assistant Attorney General, to Gregory R. Anrig, Commissioner of Education. See also, Virginia (1973) Report of the Attorney General, p. 284 (Aug. 3, 1973); and Georgia, Opinion No. 76-74 (July 12, 1976).

scrutinized loyalty oaths for teachers,[22] and state efforts to "standardize" or "cast a pall of orthodoxy over the classroom." [23]

The same academic freedom interests are at issue here, and the same strict scrutiny should be employed to determine whether the state has a compelling need to abridge those interests.

C. Section 3001(3) Should Be Subjected to Strict Scrutiny Because It Abridges the Fundamental Right to Work for a Living in the Common Occupations of the Community.

In Truax v. Raich, 239 U.S. 33, 41 (1915), this Court ruled that it would closely examine state statutes infringing the liberty of all persons, including aliens,

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22/ Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

23/ Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 401 (1923); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961). See also, Van Alstyne, "The Constitutional Rights of Teachers and Professors," 1970 Duke L. J. 841; Note, "Academic Freedom in the Public Schools: The Right to Teach," 48 N.Y.U.L. Rev. 1176 (1973).

to work in the common occupations of the community. In a justly celebrated statement of the fundamental nature of the right to work, the Court observed (239 U.S. at 41):

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. [citations omitted] If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

This Court has repeatedly reaffirmed Truax. See Griffiths, Sugarman, and Flores, supra, holding that the Fourteenth Amendment protects aliens' right to work as attorneys, civil servants and engineers.[24/] And in

24/ In both Sugarman and Flores, the Court expressly relied on Truax, citing the "common occupation" holding. 413 U.S. at 641; 426 U.S. at 604. See, to the same effect, Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The phrase "right to work," like the phrases "right to travel," "right to privacy," etc., is a short-hand way of describing constitutional limits on governmental authority. More precisely, job applicants have a right not to be denied employment or denied consideration for employment, because of govern-
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holding that states could limit employment as a police officer to citizens, the Court took care to emphasize that police employment is not a common occupation. Foley, 55 L.Ed.2d at 294.[25/]

By any measure, teaching is a "common occupation." Few occupations of any sort, and apparently no public occupations, employ more persons.[26/]

There are good reasons "for this solicitude with respect to an alien's engaging in an otherwise lawful occupation." Flores 426 U.S. at 604. As Mr. Chief Justice Burger observed in Mauclet, 432 U.S. (1977) (dissenting), most of the Court's alienage cases "involved statutes which prohibited aliens from engaging in certain occupations or professions, thereby impairing their

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mental rules or classifications based on the applicant's status, or on other considerations unrelated to ability to perform the job.

25/ "A policeman vested with the plenary discretionary powers we have described is not to be equated with a private person engaged in routine public employment or other 'common occupations of the community ....' "

26/ Statistics collected by the New York State Department of Labor show that in 1974,
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ability to earn a livelihood, "depriving them of "the essential means of economic

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the last year for which actual figures are available, teaching (316,560 persons) was the third largest occupation in New York, following only stenographers, typists, and secretaries (491,222), and sales representatives and sales workers (375,918).

Teachers are far more common than technical engineers (98,064), accountants (91,299), social workers (43,584), medical workers (170,175), construction craft workers (227, 983), food service workers (270,465), or even laborers (293,539). New York State Department of Labor, Occupations Projections, New York State, 1974-1985 (1978), at 32-46. (The figures for teachers include 56,629 college and university teachers).

In New York, teaching is also apparently the largest single category of public employment. In 1977, there were 170,706 public school teachers. By contrast, in 1974, the public sector employed far fewer transit workers (35,451), police and detectives (70,648), and public administrators and public inspectors (69,052). New York Dept. of Labor, op. cit., at 32-47. In 1977, 1,259,400 persons worked for New York State or local government. New York State Dept. of Labor, Division of Research and Statistics, Bureau of Labor Market Information. Thus, teachers in public schools and universities constitute approximately 13.5% of all public employees in New York State.

survival," and thus abridging "a fundamental personal interest...." (emphasis in original). In addition to this fundamental personal interest in employment, there is also a strong public interest in permitting aliens to work in common occupations, because aliens who cannot work will be entitled to welfare benefits, at public expense. Graham v. Richardson, supra. 27/ Conversely, permanent resident aliens who are permitted to work support public programs through payment of federal, state and local taxes. Sugarman, 413 U.S. at 645; Griffiths, 413 U.S. at 722.

Furthermore, as discussed in more detail infra Point III, aliens granted

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27/ In Hampton v. Mow Sun Wong, 426 U.S. 88, 115 (1976), the Court acknowledged "the public interest in avoiding the wholesale deprivation of employment opportunities" to aliens.

the status of permanent resident aliens are authorized by Congress to live and work anywhere in the United States, and many permanent resident aliens acquire that status only after a federal determination that the alien's intended employment --expressly including teaching-- will benefit the United States.[28/] Because aliens cannot live where they cannot work, restrictions on employment may conflict with or at least frustrate federal policies. Thus, employment restrictions should be closely scrutinized.[29/]

Summary of Point I. Education law § 3001(3) discriminates against a suspect class. It abridges the fundamental rights of academic

28/ See generally, Carliner, The Rights of Aliens (Avon/Discus, 1977), pp. 28-34. See also, 8 U.S.C. § 1182(a) (14); 8 U.S.C. § 1101(a) (32); 8 C.F.R. §§ 204.1(c) and 204.2(e) (4).

29/ See, for example, Rosberg, supra n.10 at 315: "calling alienage a suspect classification may be just another way of saying that federal law implicitly requires the states, except in cases of special need, to accord resident aliens the same treatment as citizens."

freedom and the right to work in the common occupations of the community. For each of these reasons, the statute should be subjected to strict scrutiny, and the state should be required to meet a heavy burden of justification. Furthermore, even if any one reason were not alone sufficient to require strict scrutiny, in the circumstances of this case, the collective force of these reasons requires strict scrutiny.

II. EDUCATION LAW § 3001(3) DOES NOT PROMOTE A PERMISSIBLE AND SUBSTANTIAL STATE PURPOSE OR INTEREST, IS NOT NECESSARY, AND IS NOT NARROWLY AND PRECISELY DRAWN.

Appellants have limited their defense to a single state interest said to be compelling and precisely furthered by § 3001 (3). As stated in their offer of proof:

> [A]liens who voluntarily refuse naturalization and thereby choose to continue their allegiance to another nation and their identification with the political tradition, culture and mores of the nation are not appropriate teachers in a curriculum that requires imparting principles of American citizenship. A 34. See also, Appellants' Brief at 25, 29.

As we shall demonstrate, Appellants have not shown, as they must, that the state's "purpose or interest is both constitutionally permissible and substantial," (Point II. A.), and that its use of the classification is "necessary to the accomplishment" of "its purpose or the safeguarding of its interest" (Point II. B.). Griffiths, 413 U.S. at 721-23. And they have not shown that the means employed were "precisely drawn in light of the acknowledged purpose" (Point II. C.),

Sugarman, 413 U.S. at 643.

A. The State's Purpose And Interest Are Not Permissible Or Substantial.

The purpose of Education Law § 3001 (3) is to compel or induce alien teachers to demonstrate national affinity by becoming citizens in order to protect the state's asserted interest in requiring that all teachers "identify with the democratic principles, values and attitudes they will teach from curriculum materials and by their own example." Appellants' Brief at 25.

1. Compelling or inducing aliens to demonstrate national affinity by becoming citizens is not a permissible state purpose.

This Court's decision in Mauclet is directly controlling on this point. There, as here, New York limited benefits to citizens and declarant aliens and said the purpose of the limitation was to insure national affinity. Although it might be permissible for the federal government to compel citizenship, the federal government has chosen not to do so. As the Court noted in Mauclet,

federal law permits resident aliens to petition for naturalization, usually after five years' residence, but it does not require them to do so. Mauclet, 432 U.S. at 7, n. 8. Accordingly, the Court ruled that compelling or inducing citizenship is not, for a state, a permissible purpose (432 U.S. at 10):

> Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere. U.S. Const., Art. I, § 8, cl. 4.30/

2. Requiring teachers to "identify" with certain homogeneous principles, values and attitudes is not a permissible state interest.

Two points must be stressed. First, imparting democratic principles, values and attitudes is certainly a permissible state interest. Whether Education Law § 3001(3) is either appropriate or necessary to achieve that interest will be discussed infra, Point II. B. In this Section, however, Appellees will show that requiring all teachers to "identify" with

30/ See, to the same effect, Hines v. Davidowitz, 312 U.S. 52, 68 (1941); DeCanas v. Bica, 424 U.S. 351, 354 (1976).

those principles is not a permissible state interest.

Second, Appellees do identify with democratic principles, values and attitudes, and if permitted to so so would impart those principles to their public students, as Appellee Norwick has done with private students for six years.31/ Assuming arguendo,

31/ The fact that an alien has not yet decided to "renounce" foreign citizenship does not mean that aliens cannot identify with democratic principles. Griffiths, 413 U.S. at 724-726 and accompanying notes. There are many reasons for not renouncing citizenship in an alien's native land. Individuals may have strong emotional ties to the place of their birth, and may not want to "close a door to the past." Rosberg, supra n. 10 at 302. They may want their children born in the United States to have the considerable benefits of dual citizenship. They may, under foreign laws, need to retain foreign citizenship in order to maintain ownership of foreign property. Many aliens, including both Appellees, for example, would immediately become citizens of the United States if they did not have to renounce foreign citizenship in order to acquire that status. Renunciation of citizenship in one's native land is an extraordinarily personal decision that may turn on many factors other than identification or lack of identification with that country's political principles. It is for that reason that renunciation of citizenship is not lightly to be presumed. See, Afroyim v. Rusk, 387 U.S. 253 (1967); Trop v. Dulles,
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however, that Appellees did not fully "identify" with democratic principles, the state would not have a permissible interest in requiring them to do so.

Whether in the form of a loyalty oath or, as here, a required declaration of intent to become a citizen, compelled political identification, particularly in the classroom, violates the First Amendment and is not a permissible state interest.[32/] And the court has recently confirmed its holding in Keyishian "that political association alone could not, consistently with the First Amendment, constitute an adequate ground for denying public employment." Elrod v. Burns, 427 U.S. 347, 358-359 (1976).

B. Education Law § 3001(3) Is Not Necessary To Promote A Compelling State Interest.

Assuming, arguendo, that New York has a

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356 U.S. 86 (1958); Terrazas v. Vance, ___ F.2d ___ (7th Cir. 1978), 46 U.S.L.W. 2651.

32/ See authorities supra, notes 22 and 23.

permissible state interest, that interest is not compelling, and Education Law § 3001 (3) is not necessary to achieve it.

1. The state legislature has disclaimed any interest in excluding alien teachers from public schools.

In sharp contrast to this Court's prior cases considering the exclusion of aliens from employment or benefits, the interest asserted in this case cannot fairly be ascribed to the legislature, or to the judiciary. Instead, it is identified and implemented solely by a single, non-elected state official.

Education Law § 3001(3) states that its citizenship or declaration of intent requirements "shall not apply" after July 1, 1967 to aliens employed pursuant to whatever regulations the Commissioner of Education, Appellant Ambach, chooses to adopt. Should Appellant decide tomorrow

to adopt a new regulation permitting aliens to teach in public schools, or in certain grade levels, or in certain subject areas, no state statute or interest would preclude him from doing so.

Under these circumstances, it is plain that the New York legislature has not mandated the exclusion of non-declarant aliens, To the contrary, although such exclusion was once required, the legislature has eliminated that requirement, and has authorized Appellant to employ non-declarant aliens if he chooses to do so. The legislature imposed no criteria or standards to limit Appellant's discretion to employ non-declarant aliens. Thus, the legislature has, in so many words, disclaimed any interest, much less a compelling interest, in excluding non-declarant aliens.

Where, as here, a rule infringes the liberty of an identifiable class of persons who, entirely apart from the rule, are already subject to disadvantages not shared by the remainder of the community, the Court has required that the decision to impose the deprivation be made at the

highest levels of government. Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976). Compare Board of Regents v. Bakke (Opinion of Powell, J.):

> Petitioner does not purport to have made, and is in no position to make such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria. Cf. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). (footnote omitted)

The constitutional values implicated by § 3001(3) are too important to be overridden by the unchecked judgment of a single, unelected state official.[33/]

33/ In addition, examination of the powers of the Commissioner of Education demonstrates that the reasons advanced to justify his exclusion of non-declarant aliens are not properly of his concern. Compare Hampton v. Mow Sun Wong, 426 U.S. at 116. The legislature, not the Commissioner, is given authority to legislate for the safety, health, morals, and general welfare of school children.
(FN 33 continued on next page)

2. The state legislature has authorized aliens to govern public schools.

Another provision of the Education Law authorizes aliens to vote in public school board elections and to serve as elected school board members. Education Law §§ 2590-c(3) and (4) provide that "every registered voter residing in a community district and every parent of a child attending any school under the jurisdiction of the community board of such district who is a citizen of the state ... shall be eligible to vote at such election for the members of such community board" and "shall be eligible for membership on such community board" (emphasis added). That statute has been officially construed by the New York City Board of Elections

Packer Collegiate Institute v. University of the State of New York, 273 App. Div. 203, 76 N.Y.S.2d 499 (1948), rev'd on other grounds, 298 N.Y. 184, 81 N.E.2d 80 (1948). See generally, New York State Constitution, Art. XI, § 1. Nothing in the Commissioner's grant of power, NYEL § 305, makes the inculcation of "the principles of American citizenship" subject to the Commissioner's definition or control.

and by the New York City Board of Education to require state citizenship, but not federal citizenship. A. 27-32.[34/] See, to the same effect, Coalition For Education In District One v. Board of Elections, 370 F. Supp. 42, 46 n.7 (S.D. N.Y. 1974)("such parents must be citizens of New York State, but not necessarily of the United States"), aff'd, 495 F.2d 1090, 1092 (2d Cir. 1974)("New York allows parents of students to participate in school board elections even when they are not otherwise eligible to vote in the district"). It is thus legally possible,

34/ Education Law § 2590-c was enacted in 1969, subsequent to the legislature's amendment of § 3001(3) in 1967. As noted in a letter from the Counsel to the Chancellor of the Board of Education of the City of New York, "both the Board of Education and the Board of Elections have interpreted the applicable statute (Educ. Law Section 2590-c) to provide for voting by both registered voters and by parent voters who meet the requirements of the Statute, notwithstanding that they are not United States citizens. The community school board elections which have been held to date have extended the franchise to parent voters regardless of citizenship." A 27. That these interpretations are correct is clear from the fact that the legislature, aware of those official
(FN 34 continued on next page)

and quite conceivable in many school districts in New York City, that aliens will be elected and may even compose a majority of the membership of community school boards. These boards are authorized by law (Education Law § 2590-e) to hire and fire teachers, specify curriculum, select textbooks, and "generally manage and operate the schools." It is frivolous for Appellants to contend that New York has a "compelling" interest in barring alien teachers from public schools, or that § 3001(3) is "necessary," when New York permits aliens to govern those very schools, and to make the kinds of "broad policy" decisions teachers do not make. Thus, Appellee Dachinger, who would apparently qualify as a parent voter, could serve as a member of a community school board. As such, she could participate in the hiring of teachers, but she could not

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interpretations for several years, has not amended § 2590-c to require United States citizenship.

hire Appellee Norwick.[35/]

The only state interest that would require the exclusion of alien teachers from teaching in public schools but would permit their serving as school board members is an interest in limiting the expenditure of public funds to citizens. Alien public school teachers are paid from government funds; alien school board mem-

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35/ The above-noted administrative and judicial constructions of § 2590-c recognize that at least for some purposes aliens can be citizens of New York even though they are not citizens of the United States. In fact, the only apparent requirement for New York citizenship is domicile; that is, permanent residence in the state coupled with an intent to reside in the state indefinitely. Although state citizenship does not automatically confer all political rights (minors can be state citizens but they cannot vote), there are no sub-categories of state citizenship. Thus, if Appellees (and other permanent resident aliens) are state citizens, they should be invested with the same presumption of loyalty to the state and its values as other state citizens. In its narrowest form, therefore, the question presented is whether New York has a compelling interest in requiring its own citizens to become United States citizens before they can teach in New York public schools.

bers serve without pay. Education Law § 2590-c(1). This financial distinction might also explain why aliens are permitted to teach in private schools, but not in public schools. In Graham, however, this Court rejected the old "public interest" doctrine and ruled that a state could not justify discrimination against aliens "on the basis of a State's 'special public interest' in favoring its own citizens over aliens in the distribution of limited resources." 403 U.S. at 372. See to the same effect, Sugarman, 413 U.S. at 645.

It is not mere speculation to suggest that exclusion of alien teachers from public schools is prompted in whole or large part by the state's desire to conserve limited resources for citizens. Indeed, in C.D.R. Enterprises, Ltd. v. The Board of Education, 412 F. Supp. 1164 (E.D.N.Y. 1976), summarily affirmed sub nom. Lefkowitz v. C.D.R. Enterprises, Ltd., 429 U.S. 1031 (1977), New York unsuccessfully attempted to justify, on that ground, a statute which gave an employment preference to citizens in con-

struction of public works projects. See 412 F. Supp. at 1166, 1169-1172.

3. Statutory and regulatory exceptions demonstrate that New York does not have a compelling interest in limiting public school teaching to citizens or declarant aliens.

Private school students comprise 18% of New York's total grade school and elementary school student population.[36/] It would be absurd to suggest that New York has a "compelling" interest in insuring that public school students learn the principles of democracy, but no interest in insuring that private school students learn those principles. And in fact, New York requires instruction in those principles for both public and private students. See Appellants' Brief at 8-12, and statutes cited therein. Education Law § 3001(3), however, does not

36/ Of the 3,189,781 students enrolled in grades K-12 in New York in 1977 (see Appellants' Brief at 13), 588,258 (or 18%) attended private schools where the citizenship requirement does not apply. State Department of Education, Information Center on Education, Basic Education Data System, 1977-1978 school year.

require teachers in private schools to be citizens or declarant aliens. If that requirement is not "necessary" to insure that private school students learn those principles, it is not necessary to insure that public school students learn those principles.

Similarly, under a regulation promulgated by Appellants, an alien may be allowed to teach in public schools when he or she is "unable to declare intention of becoming a citizen for valid statutory reasons." 8 N.Y.C.R.R. 80.1(i)(2). The only statutory restriction on filing a declaration of intent is the requirement that the declarant be a permanent resident alien. Thus, if identification with the principles of American citizenship is deemed a compelling necessity for public school teachers, it is hard to see why that requirement is wholly waived for persons least likely to share those values (e.g., the alien dependents of foreign diplomats and representatives to the United Nations; illegal aliens; student aliens who have overstayed their visas; etc.), and is applied to permanent resident aliens who have chosen to live

here indefinitely, and have been authorized to do so by the federal government.

Finally, New York does not exclude alien teachers from its public schools if they have "skills or competencies not readily available" among citizen teachers, 8 N.Y.C.R.R. § 80.2(i)(1), or if they are here through certain exchange programs, N.Y.E.L. § 3005. These exceptions are inconsistent with a finding that the state interest is "compelling."

4. The legislatively mandated oath requirement satisfies any permissible interest the state might have.

Many citizens do not believe in the principles of democracy and do not share the values New York wishes to inculcate. Recognizing that citizenship is not of itself a sufficient guarantee that a teacher will believe in and share those principles and values, the New York Legislature has mandated that citizens who wish to teach in public schools must take a specified oath to support the Constitution. Education Law § 3002. An identical oath is required for those non-citizens who are permitted to teach.

Education Law § 3001-a. Appellees have expressed their willingness to take that oath. A 6; A 18; A 43.

This Court has already ruled there is "no merit in the contention that only citizens can in good conscience take an oath to support the Constitution" and that states cannot presume aliens "are unable to take the oath in good faith." Griffiths, 413 U.S. at 726 n. 18. Taking the specified oath is a sufficient test of identification with democratic principles to satisfy any permissible state interest. Accordingly, no other requirement is "necessary."

5. The experience of other states shows that Education Law § 3001(3) is not necessary.

Even if every state had a citizenship requirement for teachers, that would not make such requirements constitutional. But in deciding whether such a requirement is necessary in New York, it is relevant to note that only ten other states presently have or enforce such requirements. Thus, almost four-fifths of the states do not believe such requirements are neces-

sary, and a decision in this case that such requirements are unconstitutional would have very little disruptive effect.

Most of the statutory or regulatory citizenship requirements were adopted many years ago, often during wars or periods of intense anti-foreign sentiment.[37/]

So far as Appellees are aware, no state has adopted a citizenship requirement for teachers in the last ten years. During that period, however, several states have eliminated such requirements either legislatively, administratively, or through opinions of state attorneys general.

At the present time, only one state enforces a statutory requirement of citizenship.[38/] No state, by regulation,

37/ See Schrieke and Stephenson, supra n. 3. The citizenship requirement of § 3001(3) was originally enacted in 1918. Appellants' Brief at 7.

38/ Tenn. Code Ann. § 49-1303. The information in this section is compiled from Appendix D, "Table of Statutory Restrictions on Alien Employment," in Carliner, The Rights of Aliens (Avon/Discus, 1977), as supplemented by the answers to a questionnaire sent to each state by Appellants with Appellees' permission.

requires citizenship. Not counting New York, six states, by statute, enforce a requirement of citizenship or declaration of intent to become a citizen.[39] Three states, by regulation, enforce a requirement of citizenship or declaration of intent to become a citizen.[40] The present law regarding citizenship requirements is unclear in Virginia and Georgia.[41] And in six states, the

39/ Idaho Code § 33-1202(4); Montana Revised Code § 75-6005; North Dakota Century Code 15-36-07; Washington Revised Code Annotated 28A.67.020; West Virginia Code 18A-3-1; and Texas Statutes Art. 2891(b) § 5.

40/ Mississippi Dept. of Education, "Requirements for Teacher Certification," Bulletin 130 (1975); Oklahoma Dept. of Education, "Teacher Education, Certification and Assignment Handbook (July, 1975); and Wyoming State Board of Education, Teacher Certification Regulations § 3, ch. (1).

41/ In earlier years, Virginia did not have a citizenship requirement for teachers. See Virginia State Board of Education, Certification Regulations for Teachers and Qualifications for Administrators and Supervisors, Vol. XXXIII, No. 1, July 1950, reprinted in 1955, at p. 6. But apparently some time around 1960, the State Board adopted a requirement that an applicant for a teacher's certificate
(FN 41 continued on next page)

Attorney General has ruled unconstitu-

"must be a citizen." See Virginia State Board of Education, Certification Regulations for Teachers and Qualifications for Administrative, Supervisory, and Related Instructional Positions, Vol. 46, No. 2, August 1963, p. 2. That requirement has continued to the present. See Certification Regulations for Teachers, Division of Teacher Education and Certification, Dept. of Education, Commonwealth of Virginia, January, 1978, at p. 3. But in 1973, the Attorney General of Virginia issued an opinion that "state statutes which make citizenship, or the declaration of an intent to become a citizen, a condition of licensing are unconstitutional." Report of Attorney General, 1973-1974, p. 284 (August 2, 1973). Although specifically applicable only to "statutes," the reasoning of the opinion would be equally applicable to regulations.

Furthermore, the opinion relied upon the lower court decision in Miranda v. Nelson and noted that the case involved a teacher (p. 285). Accordingly, the current regulation requiring citizenship is probably unenforceable, but Appellees have been unable to determine whether it is or is not being enforced.

In Georgia, the Attorney General has ruled that "aliens cannot be broadly excluded from all public employment." Opinion 76-74, July 12, 1976. But Appellees have been unable to determine whether the current regulatory requirement of citizenship is being enforced.

tional statutory or regulatory provisions which preclude aliens from being teachers.[42]

6. Education Law § 3001(3) does not reasonably or rationally advance any legitimate state interest.

Assuming, arguendo, that strict scrutiny is not required, the statute does not survive scrutiny under the heightened[43] rational relation test,

42/ E.g., Illinois Attorney General 1974, Opinion No. 5-747 (April 19, 1974); California, Vol. 53 Attorney General's Opinions, p. 63 at pp. 68-69 (Opinion No. 69-199, Feb. 6, 1970); New Jersey Attorney General Formal Opinion No. 10-1974 (Sept. 23, 1974)(citizenship or declaration requirement unconstitutional); Pennsylvania, 1973 Opinion No. 9 (Jan. 16, 1973)(citizenship or declaration requirement unconstitutional); Massachusetts Attorney General, letter of Oct. 29, 1974 from Walter H. Mayo, III, Assistant Attorney General, to Gregory R. Anrig, Commissioner of Education: "it is our opinion that the citizenship provisions of the teacher's certification statute are unconstitutional under the Constitution of the United States;" Michigan, Opinion No. 4925, Jan. 16, 1976. See also, Virginia and Georgia, supra n. 41. And see, notes 18 and 19, supra.

43/ E.g., Craig v. Boren, 429 U.S. 190, 198 (1976); Frontiero v. Richardson, 411 U.S. 677, 690 (1973); Stanley v. Illinois, 405 U.S. 645, 656 (1972).

or even under the minimal rational relation test.[44]

If the statute required citizenship, the Court would have to determine whether citizenship rationally advances a legitimate state interest. But the statute requires citizenship or a declaration of intent to become a citizen in the future, so the Court need only determine whether the requirement of declarant status rationally advances a legitimate state interest.

The state's interest in imparting the principles of citizenship is not reasonably advanced by a statute which permits teaching by an unmarried declarant

44/ E.g., Rosberg, supra n. 10 at 306: "How important can the state's interest be if it is prepared to separate the loyal from the disloyal by means of a technique as haphazard as classifying on the basis of alienage? The classification is seriously under- and overinclusive, and even without strict scrutiny courts might well hold that the connection between means and end is too slight to support the classification."

alien, on the first day of residence in the United States, but forbids teaching by non-declarant aliens such as Appellees who have lived here for more than a decade, are married to United States citizens, and have paid taxes to support the schools in which they would teach. Unmarried aliens who acquire permanent resident status on the day of admission to this country, and promptly file declarations of intent to become citizens, can teach for five years before they are eligible to petition for naturalization. During that time they can change their mind about becoming citizens, without any state or federal penalty. But at that time, regardless of the quality of their classroom performance, or their demonstrated identification with the principles of democracy, they must petition for naturalization or lose their certificates to teach.

The act of declaring intent to become a citizen is less formal than an oath and provides less guarantee of present identification with the principles of democracy than does the oath required of all teachers, including citizens. The

declaration is therefore superflous. The filing of a declaration does not magically invest the alien with the attributes of a citizen. That this is so can more clearly be seen by turning the point around. The state would not contend, for example, that declarant aliens should be eligible to vote, to serve on juries or to be police officers.

Even a good faith declaration is nothing more than expression of a present intent, at some point in the future, to petition for United States citizenship. It provides no real assurance that the alien is familiar with the principles of democracy, shares those principles, or will petition for and complete the process of naturalization. And the absence of a penalty for failure to complete the naturalization process means that an alien who has no real intent to become a citizen could nevertheless file a declaration and teach for at least five years, without penalty.

Thus, the declaration requirement of § 3001(3) does not reasonably or rationally advance any legitimate state interest.

C. Education Law § 3001(3) Is Inconsistent With Settled Principles of Education And Academic Freedom.

America is a nation of immigrants. That cultural diversity is the foundation of our nation's strength. But given that diversity, it is unrealistic to assume that all Americans share identical political or cultural beliefs, attitudes and values. In a pluralistic society such as ours, the principal objective of public education is to increase understanding of, and tolerance for, that diversity so that students with varied cultural heritages will learn to live together, with respect for their differences. Education Law § 3001(3), however, seeks to suppress respect for diversity and to compel standardization of ideas. Accordingly, it is inconsistent with our deep and historical commitment to an open society, and with basic educational principles.

Appellees wish to stress that they do believe in the principles of democracy and would, as teachers, impart those principles, by word and example. Furthermore, even if some alien teachers did

have different perspectives or attitudes which varied somewhat from Appellants' hypothetical but unrealistic citizen-norm, those differences would inform and enhance the educational experience of their students.

Preliminarily, it does not denigrate the overall importance of the teacher to suggest that the teacher's role in "political socialization" is not nearly so great, or so clear, as Appellants contend. Although teachers' attitudes are no doubt to some extent transmitted to students, the principal study relied upon by Appellants acknowledges that "evidence on the amount of such attitude transmission is neither readily available nor precise."45/

45/ Hess & Torney, The Development of Political Attitudes In Children (1967), at p. 111 (cited in Appellants' Brief at 21, 22, 23, 24 and 25). Furthermore, as Hess and Torney point out, "it seems likely that much of what is called citizenship training in the public schools does not teach the child about the city, state, or national government, but is an attempt to teach regard for the rules and standards of conduct of the school." Id. at p. 218.

Many non-school factors, including family, religion and individual intelligence and experience, contribute to political socialization. Furthermore, later studies, not cited by Appellants, conclude that even within the school, the teacher's contribution to political socialization is unclear.[46/]

The American classroom has properly been described as "the market place of ideas." Keyishian, 385 U.S. at 603. Standardization of teachers or ideas is inconsistent with that basic principle of academic freedom. Thus, in Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), this Court rejected a state attempt to use public schools to "standardize" students.[47/] And in Meyer v. Nebraska, 262 U.S. 390, 401 (1923), this Court invalidated a Nebraska

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46/ Eg., Jennings and Niemi, The Political Character of Adolescence: The Influence of Families and Schools (1974), at p. 182: "It is apparant that curriculum, teachers, school climate, and peer groups all may contribute to the political socialization process; but the relative contribution of each is unclear." "Our findings certainly do not support the thinking of those who look to the civics curriculum in American high schools as a major source of political socialization." Id. at p. 205.

47/ "The fundamental theory of liberty upon (FN 47 continued on next page)

statute which prohibited the teaching of foreign languages in public (and private) schools. The state interest asserted in Meyer was almost identical to the interest asserted here:

> the purpose of the legislation was to promote civil development by inhibiting training and education of the immature in foreign tongues and ideals....(emphasis added).

The Court spurned Nebraska's contention that allowing foreign-born students to be taught in their native language would inculcate in them ideas and sentiments foreign to the best interests of this country.[48/] The Court has

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which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State...."

48/ Although Meyer was decided before the express incorporation of First Amendment rights into the Fourteenth Amendment, it has since been read by this Court as a First Amendment case. Epperson v. Arkansas, 393 U.S. 97 (1968). Appellees, of course, do not intend to teach foreign "ideals." Their submission, to the contrary, is that they are prepared to communicate precisely what the state can legitimately require of teachers. Indeed, with the benefit of a comparative view, and more than a (FN 48 continued on next page)

ruled, citing Meyer, that a state may not conduct its schools deliberately to "foster a homogenous people." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969). The Court's strong support for academic freedom and careful restriction of loyalty oaths for teachers[49/] reflect the First Amendment's intolerance for laws "that cast a pall of orthodoxy over the classroom." Keyishian, 385 U.S. at 603.

Indeed, it would seem to follow a fortiorari from Keyishian, supra, West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), and their progeny, that if a state cannot prevent citizens who are acknowledged communists from teaching, and cannot require pupils or citizen teachers to participate in or lead the pledge of allegiance to the flag,[50/] it cannot

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decade of residence in the United States with American spouses, it is likely that Appellees could communicate the spirit and substance of American values as well as, if not better than, native born teachers, many of whom take our institutions for granted.

49/ See authorities cited supra notes 22 and 23.

50/ Eg., Russo v. Central School District

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exclude from the classroom non-communists who are willing to take an oath of allegiance, simply because they are not citizens or declarant aliens.

Furthermore, in a diverse, pluralistic society, " 'the robust exchange of ideas'... is of paramount importance in the fulfillment of [the educational] mission." Regents of the University of California v. Bakke, 57 L.Ed.2d at 786 (1978) (Powell, J.). In Bakke, Mr. Justice Powell discussed at length the educational and constitutional importance of "a diverse student body." Bakke, 57 L.Ed.2d at 785-786:

> The atmosphere of "speculation, experiment and creation" - so essential to the quality of higher education - is widely believed to be promoted by a diverse student body. As the Court noted in Keyishian, it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as

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No. 1, 469 F.2d 623 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973); Hanover v. Northrup, 325 F. Supp. 170 (D.Conn. 1970); State v. Lundquist, 262 Md. 534, 278 A.2d 263 (1971); Opinions of the Justices to the Governor, 363 N.E. 2d. 251 (Mass., 1977). See also, James v. Board of Education of Central District No. 1, 461 F.2d 566 (2d

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this Nation of many peoples.

> Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission. (footnote omitted)51/

The same educational and constitutional principles that call for diversity among students call for diversity among teachers.

There are other societal benefits to be gained from permitting aliens to teach. Just as a Black teacher serves as a positive role model for a Black student, an alien teacher serves as a positive role model

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Cir. 1972)(teacher cannot be fired for expressing opposition to our national policy regarding Vietnam by wearing black armband).

51/ In the omitted footnote, the President of Princeton University "described some of the benefits derived from a diverse student body" including "interactions among students ...from various states and countries...." Bakke, 57 L.Ed.2d at 785, n. 48.

for an alien student -- tangible evidence to the student that aliens can play a useful and productive role in American society.52/

D. Education Law § 3001(3) Is Not Narrowly or Precisely Drawn.

This is the ground on which the three-judge court found the statute to be unconstitutional. A 44-47.53/

1. The statute is underinclusive.

If the state really wants to prevent persons who have not renounced a foreign citizenship from teaching New York students, the statute does not accomplish that goal. It does not prevent such persons from teaching in private schools. And it does not prevent such persons, if they hold dual citizenship, from teaching in public

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52/ Although precise figures are not available, it is clear that large numbers of alien students attend New York public schools, particularly in New York City. See generally, A 27-28.

53/ See generally, Rosberg, supra n. 10, at 315: "As a test of affinity, an alienage classification is seriously over - and underinclusive."

schools.[54]/

2. The statute is overinclusive.

The statute prohibits an alien from any country from teaching any subject at any grade level.

Country. Assuming, arguendo, that the state has an interest in requiring aliens who come from countries with political systems and values quite different from our own to renounce those values, this statute sweeps much more broadly than that, and requires renunciation of political and cultural values almost indistinguishable from our own. Appellee Norwick, for example, is a citizen of Great Britain, a country whose political and cultural values are much like our own. In fact, so close are those values that renunciation of Great Britain's values would be inconsistent with acceptance of our own.

Recognizing that not all countries are alike, the federal government has drawn

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54/ Persons born in the United States of alien parents may be dual citizens. 8 U.S. C. § 1482. They do not have to renounce citizenship in the other country in order to teach in New York schools.

geographical distinctions, even for highly sensitive positions. For example, although the Public Works Appropriation Act of 1971[55]/generally provides that employees of the Atomic Energy Commission and similar sensitive agencies must be citizens or declarant aliens, the Act expressly exempts aliens from designated countries.[56]/

Subjects. As the three-judge court noted, although this statute prevents a Russian citizen from teaching civics, it also prevents a French citizen from teaching French, a British citizen from teaching math, and a Canadian citizen from teaching metal working or gym. A 45.

55/ Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission Appropriation Act, 1971, Pub. L. No. 91-439; 84 Stat. 890 (1971).

56/ The act exempts "an alien from Poland or the Baltic countries lawfully admitted to the United States for permanent residence," and exempts "citizens of the Republic of the Phillippines," and "nationals of those countries allied with the United States in the current defense effort...." Pub. L. No. 91-439, § 502. (1970 U.S. Code, Cong. & Ad. News 1040, 1051). This distinction was noted by the three-judge court during oral argument. See Transcript of argument on February 11, 1976, p. 21.

Grade Level. This statute prevents the employment of a non-declarant alien at any grade level from kindergarten through college. Although Appellants apparently do not qualify or certify teachers for public colleges (Appellants' Brief, p. 13 n. *), that is irrelevant. "Certification" of teachers is only one of the three basic requirements of § 3001 (age; certification; and citizenship.) Thus, even if Appellants do not certify public college teachers under § 3001(2), the citizenship requirement of § 3001(3) nevertheless requires public college teachers to be citizens. The immediate predecessor of § 3001(3), identical in this respect, has been so construed by the New York courts, and that construction has not been changed by the legislature. For example, because he was not a citizen, Bertrand Russell was prohibited from teaching in a New York public college.[57/]

57/ Kay v. Board of Higher Education, 173 Misc. 2d 943, 18 N.Y.S. 2d 821 (Sup. Ct. N.Y. Co.); aff'd 259 App.Div. 879, 20 N.Y.S. 2d 1016; leave app. den., 259 App. Div.1000, 21 N.Y.S. 2d 396 (1st Dep't); leave app. den., 284 N.Y. 578 (1940).

Furthermore, the statutory sections immediately following § 3001 show, on their face, that the legislature intended this statutory scheme to apply to college teachers. Sections 3001-a and 3002, for example, specify the oath that must be taken by citizens and by those aliens who are permitted to teach, and they expressly require designation of the "school, college, university or institution" to which the teacher will be assigned.

Even within the pre-college grades (K-12), the state's interest in political socialization of students drops sharply, and becomes "at best" "speculative" after the eighth grade.[58/] The state's

58/ In Wisconsin v. Yoder, 406 U.S. 205, 226-227 (1972), for example, the court noted that the "requirement for compulsory education beyond the eighth grade is a relatively recent development in our history" and that "there is at best a speculative gain, in terms of meeting the duties of citizenship, from an additional one or two years of compulsory formal education [after eighth grade]." See, to the same effect, Hess & Torney, supra n. 45 at p. 114: "...from these data it may be argued that many of the basic orientations are established in the pre-high school years."; Jennings & Niemi, supra n. 46 at p. 183; Easton & Hess, "The Child's Political World," 6 Midwest J. of Political Science

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interest in political socialization of children age 16 or over, usually grade 10, is so slight that full time compulsory education is ordinarily not required at all. New York Education Law § 3205(1).

But this statute, under the asserted justification of political socialization, prohibits non-declarant aliens from teaching even students aged 17-21, in grades 11 or 12, and students of any age in college, where attendance is not required.

Finally, in deciding whether § 3001 (3) is narrowly drawn it is relevant to note, as did the court below, "that Section 3001(3) is but one aspect of a rather comprehensive statutory scheme, embodied in the Education Law, prohibiting the alien from participating in a broad range of employments," including chiropractor, veterinarian and masseur. A 53 n. 14. Indeed, given the sweep of anti-alien laws New York has defended,

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229, 236 (1962); and Greenstein, "Political Socialization," 14 International Encyclopedia of the Social Sciences 551, 554 (1968).

which this and lower courts have found unconstitutional,[59/] any claim that § 3001(3) is precisely tailored should itself be subjected to close scrutiny.

59/ E.g., Graham v. Richardson, 403 U.S. 365 (1971)(welfare benefits); Sugarman v. Dougall, 413 U.S. 634 (1973)(competitive civil service); Nyquist v. Mauclet, 432 U.S. 1 (1977)(financial assistance for higher education); Lefkowitz v. C.D.R. Enterprises, Ltd., 429 U.S. 1031 (1977) (employment on public works projects); Surmeli v. New York, 412 F. Supp. 394 (SDNY 1976), aff'd, 556 F.2d 560 (2d Cir. 1976), cert. denied, 56 L.Ed.2d 400 (1978)(physician); Kulkarni v. Nyquist, 446 F. Supp. 1269 (NDNY, 1977), appeal dismissed, F.2d (2d Cir. No. 77-8015, March 9, 1977)(professional engineer and physical therapist); Sundram v. Niagara Falls, 7 Misc. 2d 1002, 357 N.Y.S. 2d 943 (1973), aff'd, mem., 44 App. Div. 2d 906, 356 N.Y.S. 2d 1023 (4th Dept. 1974) (taxi driver).

III. EDUCATION LAW § 3001 (3) IS VOID UNDER THE SUPREMACY CLAUSE BECAUSE IT IS INCONSISTENT WITH GENERAL FEDERAL LAWS REGARDING THE IMMIGRATION, RESIDENCE AND EMPLOYMENT OF ALIENS, AND WITH SPECIFIC FEDERAL LAWS REGARDING THE IMMIGRATION, RESIDENCE AND EMPLOYMENT OF ALIEN TEACHERS.

A. The Statute Is Inconsistent With General Federal Laws Regarding the Immigration, Residence and Employment of Aliens.

The power to regulate the immigration and naturalization of aliens is exclusively a federal power committed to the political branches of the federal government. De Canas v. Bica, 424 U.S. 351, 354 (1976); Examining Board v. Flores de Otero, 426 U.S. at 602. Mathews v. Diaz, 426 U.S. at 81; U.S. Const. Art. 1, § 8, cl. 4. A state statute which conflicts with the federal program for the regulation of resident aliens is void under the Supremacy Clause, Article VI, because it constitutes "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941); De Canas v. Bica, 424 U.S. at 363.

The states

> "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration..." Takahashi v. Fish & Game Comm'n, supra 334 U.S. at 419.

Accord, De Canas v. Bica, 424 U.S. at 358 n.6. A state statute which imposes "auxiliary burdens upon the entrance or residence of aliens...discourage(s) entry into or continued residency in the State," Graham v. Richardson, 403 U.S. at 378-379, and conflicts with the supreme federal power in the immigration area.

Congress has enacted a comprehensive plan for the regulation of aliens residing in the United States, and has broadly guaranteed aliens "the same right in every State and Territory...to the full and equal benefit of all laws and procedures for the security of persons and property

as is enjoyed by white citizens." 42 U.S.C. § 1981. As a consequence of this statutory declaration "aliens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens under non-discriminatory laws.'" Graham v. Richardson, 403 U.S. at 377, 378, quoting from Takahashi v. Fish & Game Comm'n, 334 U.S. at 420.

On the basis of this congressionally declared policy of equality of legal privilege, the Court has struck down state statutes which discriminated against aliens in the enjoyment of public resources, the receipt of public benefits and the opportunity to work. See Takahashi; Graham; C.D.R. Enterprises Ltd. v. Board of Education, 412 F. Supp. 1164, 1171-1172 (E.D.N.Y. 1976), summarily aff'd, 429 U.S. 1031 (1977); and Examining Board v. Flores de Otero, 426 U.S. 572 (1976).[60/]

60/ See also, Mohamed v. Parks, 352 F. Supp. 518, 521 (D. Mass. 1973); Sugarman v. Dougall, 339 F. Supp. 906, 910-911 (S.D.N.Y. 1971)(three-judge court); Younus v. Shabat, 336 F. Supp. 1137, 1139-1140 (N.D. Ill. 1971)(on both equal pro-

(FN 60 continued on next page)

The same result is required here. Congress has carefully established a scheme for the admission and naturalization of immigrants and has clearly decided not to condition the employment of aliens on naturalization. The Congressional plan explicitly contemplates, and sanctions, sizeable groups of permanent resident aliens (approximately 4 million at the present time), economically paying their way by engaging in their chosen occupations and professions. Section 3001 (3) imposes serious, additional burdens and restrictions on such aliens by requiring that they become citizens as a precondition to engaging in their professions. The state is forbidden to impose such burdens. Graham, 403 U.S. at 377-379. Takahashi, supra; Hines v.

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tection and Supremacy Clause grounds), aff'd in an unpublished opinion of the 7th Cir. Court of Appeals, No. 72-1051, Jan. 3, 1973; Purdy & Fitzpatrick v. California, 71 Cal. 2d 556, 79 Cal. Rptr. 77, 456 P.2d 645 (1969). This Court did not need to resolve the Supremacy Clause challenges in Mauclet and Sugarman, supra.

Davidowitz, supra.

The burden imposed is especially inconsistent with the federal interest that aliens be gainfully employed, because of the number of jobs affected. Teaching is the third largest occupational category in New York, and is apparently the largest category of public employment (see n. 26 supra). Moreover, educated aliens are particularly suited to teaching subjects that know no geographic boundaries, such as science and mathematics, and are uniquely suited to teaching the language, history and customs of their native lands. By comparison, the Court struck down as violative of federal immigration policy an Arizona law that permitted aliens to work as laborers, but limited the proportion of aliens employed by every employer of more than five workers to less than 20%. Truax v. Raich, 239 U.S. 33 (1915).

Section 3001(3) thus constitutes a burden on employment, an area crucial to the alien's development and survival. Most states do not impose such a burden on alien teachers (see Point II.B.5, supra). Accordingly, Section 3001(3) discourages entrance and residence in

New York State and therefore conflicts with the federal grant of resident alien status to Appellees, and with the federal policy expressed in 42 U.S.C. § 1981 of "equality of privileges" under state laws for all resident aliens. Graham, supra.

New York's asserted concern for the resident alien's lack of allegiance and its contention that it may disfavor those residents of the state who "choose to continue their allegiance to another nation" (A 34), demonstrates the extent to which § 3001(3) is inconsistent with federal law. A state law which distinguishes on the basis of loyalty to the United States between citizens and non-declarant aliens is inconsistent with federal law regulating the entrance and residence of aliens. Se Younus v. Shabat, 336 F. Supp. at 1140.[61]

61/ Although the alien-appellees in Graham were eligible for citizenship (one having resided here since 1956), neither the appellants nor the unanimous court suggested that the Arizona law could be justified by the purpose of inducing aliens to become citizens. Such a purpose, for a state, is not permissible. Hines v. Davidowitz, supra; Mauclet, 432 U.S. at 10.

The Immigration and Nationality Act already makes suitable provision for excluding persons of questionable loyalty to the United States. The provisions of 8 U.S.C. §§ 1182(a)(27), (28), (29), coupled with the questioning of entrants into this country by federal authorities,[62/] indicate that the federal government carefully considers questions such as political allegiance, and whether the alien intends to become a citizen, in deciding whether to grant admission. The term "lawfully admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residing permanently in the United States as an

62/ All aliens arriving at ports of the United States are subject to examination by immigration officers. The Attorney General and any immigration officer has the power to question entrants to the United States. "Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen...." 8 U.S.C. § 1225(a)(emphasis supplied).

immigrant in accordance with the immigration laws...." 8 U.S.C. § 1101(20). Compare 8 U.S.C. § 1101(15)(F).

Because the federal government allows selected individuals to reside in this country as permanent resident aliens, without requiring them to declare their intention to become citizens as a condition of admission or of continued residence, there is a clear federal policy that such aliens may live in each state on an equality of privileges with other state citizens without having to renounce their foreign citizenship or to declare their intent to become citizens. A state statute which directly conditions employment on factors the federal government has already considered and rejected in allowing aliens entrance into the country is a "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country" and impermissibly imposes "additional burdens not contemplated by Congress." De Canas v. Bica, 424 U.S. at 358 n. 6.

Congress is aware that aliens cannot live where they cannot work unless they are supported by a spouse or by govern-

mental benefits. Accordingly, aliens seeking permanent residence who are not at that time married to or immediate relatives of United States citizens or other permanent resident aliens must generally show they have employment skills that are needed in this country, and that their intended employment will not adversely affect wages and working conditions in the United States. See generally, 8 U.S.C. § 1182(a)(14); 8 U.S.C. § 1153(a)(3) and (6). This usually requires a "labor certification" by the Department of Labor. See generally, 20 C.F.R. § 656. Issuance of the certification requires, for many aliens, proof of a bona fide job offer on Form MA 7-50B. 8 C.F.R. § 204.1(c).

In fact, Congress has even required, in some circumstances, that aliens applying for admission as professionals meet Congressionally specified tests of competence. For example, 8 U.S.C. § 1182(a)(32) provides that certain aliens who seek admission to practice medicine must "have passed parts I and II of the National Board of Medical Examiners Examination... [and must be] competent in oral and written English."

Thus, individual aliens are granted permanent resident status on the basis of a careful federal determination that they are sufficiently loyal to the United States, even though they do not intend to become citizens; that they have employment skills that are needed in the United States; and that their employment will not adversely affect wages and working conditions. Section 3001(3) is inconsistent with those federal determinations of loyalty and employability, and is therefore void.

B. The Statute Is Inconsistent With Specific Federal Laws Regarding The Immigration, Residence And Employment Of Alien Teachers.

1. Alien teachers admitted for permanent residence.

Congress has established standards or "preferences" for determining who, among the thousands of aliens seeking permanent residence in this country, shall be granted that status. See generally, 8 U.S.C. § 1153. One of those preferences is for "members of the professions." 8 U.S.C.

§ 1153(a)(3). The "term 'profession' shall include...teachers in elementary or secondary schools, colleges, academies, or seminaries." 8 U.S.C. § 1101(a)(32). But the admission of even "preference" aliens requires a detailed federal determination of their employability.

Prior to amendments in 1976, aliens who applied for permanent resident status in order to teach were denied admission unless the Secretary of Labor had determined there were not sufficient teachers who were able, willing, available and "qualified." 8 U.S.C. § 1182(a)(14). Thus, if there was one opening for a teacher, and one teacher already here met the minimum qualifications for the position, the alien teacher would be excluded, even if the alien's qualifications were superior. In 1976, however, that section was amended to read: "able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession...)." That parenthetical addition means that alien teachers with superior qualifications will not be denied permanent resident status

just because a teacher already here has the requisite minimal qualifications.

In short, Congress has legislated with extreme precision regarding the admissibility of alien teachers. Since 1976, aliens admitted for the purpose of teaching have been admitted on the basis of a federal determination that they are better qualified to teach than any willing and available teacher already present. Thus § 3001(3) is in direct conflict with federal law regarding the admission and employment of alien teachers. And if allowed to stand, § 3001(3) might subject public school students to instruction by teachers who have been found by the federal government to be less qualified than the alien teachers.

2. Alien teachers admitted for temporary residence or as part of Congressionally authorized teacher exchange programs.

Drawing on the exclusive federal power over the field of foreign relations, Congress has comprehensively authorized and encouraged the international exchange of teachers. The Mutual Cultural and

Education Act of 1961 (Fulbright-Hays Act), P.L. 87-256, as amended, 22 U.S.C. §§2451-52, is specifically designed to encourage the employment of alien teachers in this country.[63] The International Education Act of 1966, 20 U.S.C. § 1173, authorizes the Secretary of Health, Education, and Welfare to support a variety of teacher exchange programs, including programs under which aliens may work and study here concurrently, 20 U.S.C. § 1173(a)(5), and may visit American institutions as faculty, 20 U.S.C. § 1173(a)(6). The Education Amendments of 1976, Pub. Law 94-482, 20 U.S.C. § 512a authorizes federal grants "to stimulate locally designed educational programs to increase the understanding of students in the United States about the cultures and actions of other nations in order to

63/ Pursuant to that act, in 1973-1974 the federal government expended $738,538 in grants to 320 teachers from 44 countries to enable them to teach in the United States. Library of Congress Congressional Research Source, "Authority, Operation and Administration of the Fulbright-Hays Program of International Educational Exchange" (May 5, 1976).

better evaluate the international and domestic impact of major national policies." And the Peace Corps has proceeded on the explicit Congressional finding that the free exchange of teachers furthers our foreign policy interests by advancing mutual understanding.[64]

In addition, the United States has entered into a series of bilateral treaties and conventions designed to encourage the exchange of teachers by minimizing taxation on the income of alien teachers. See generally, Historical Note, Treaties and Conventions, following 26 U.S.C.A. § 871, and treaties and conventions listed therein. See also CCH, Income Tax Treaties 57-120-57. The United States is a party to treaties encouraging international teacher exchange with both the United Kingdom and Finland, Appellees' countries of citizenship. These treaties indicate the comprehensive interest

64/ Knowledge and skill projects, involving various forms of education, comprise 31% of Peace Corps activities, and since its inception have represented its most common effort. Project Record System, Peace Corps Office of Management (May 31, 1978).

Congress has taken in this area, an interest which precludes inconsistent state involvement. Implicit in a Congressional promise to give tax benefits to alien teachers is a Congressional promise that aliens can find employment as teachers, and a Congressional finding that alien teachers will not corrupt the nation's youth.

These statutes and programs reflect a comprehensive determination by Congress that the widespread exchange of teachers is in the interests of our foreign policy.65/ They also embody a Congressional

65/ The purpose of the Fulbright-Hays Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange, to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments and achievements of the people of the United States and other nations, and the contributions being made toward a peaceful and more fruitful life for people throughout the world; to promote international cooperation for educational and cultural advancement; and thus to assist in the development of friendly, sympathetic, and peaceful relations between the United States and the other
(FN 65 continued on next page)

determination that the extensive exchange of teachers would contribute to the education of American students and to healthy and robust debate on a wide range of issues it is the function of the First Amendment to protect.66/ Congress has power to promote or even require such education exchanges pursuant to its commerce powers, foreign affairs powers, and

countries of the world." 22 U.S.C.A. § 2451. The preamble to the International Education Act of 1966 provides: "Congress hereby finds and declares that a knowledge of other countries is of the utmost importance in promoting mutual understanding and cooperation between nations; that strong American education resources are a necessary base for strengthening our relations with other countries;... and that it is therfore both necessary and appropriate for the Federal Government to assist in the development of resources for international study and research." 20 U.S.C.A. § 1171.

66/ For example, Congress declared in the International Education Act, its purpose "that this and future generations of Americans should be assured ample opportunity to develop to the fullest extent possible their intellectual capacities in all areas of knowledge pertaining to other countries, people, and cultures." 20 U.S.C. § 1171.

powers to enforce the First and Fourteenth Amendments.[67/]

Federal programs supporting the placement of alien teachers in local schools throughout the nation represent an extraordinary statement of the importance Congress attaches to the relaxation of barriers erected by local interests again the free exchange of educational resources.[68/] The breadth of Congressional concern, and the evident importance Congress has placed on such exchanges, compels the conclusion that although Congress has left to the states general responsibility over teacher certification and employment, the states may not deny

67/ The sources of Congressional power affirmatively to support the system of free expression are analyzed in Emerson, The System of Freedom of Expression (1970), at 627-633, 671-673.

68/ Education Law § 3005 permits non-declarant aliens to teach in public schools in New York, but only as part of a one-for-one exchange, and only under conditions (the domestic teacher must have taught for five years in the designated school, etc.) which discourage the free exchange of educational resources.

such employment solely on the basis of alienage. "[T]he nature of the...subject matter permits no other conclusion." De Canas v. Bica, 424 U.S. at 356, quoting Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963). Congress having determined that the national interest is served by the employment of otherwise qualified alien teachers, the exclusion of aliens per se is in clear conflict with the "central aim of federal regulation." San Diego Unions v. Garmon, 359 U.S. 236, 244 (1959), cited in De Canas v. Bica, 424 U.S. at 359.

Finally, even if the Congressional treaties, conventions, programs, and statements of purpose left some room for state legislation, § 3001(3) is nevertheless unconstitutional because it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." De Canas v. Bica, 424 U.S. at 363; Hines v. Davidowitz, 312 U.S. at 67; Florida Lime & Avocado Growers v. Paul, 373 U.S. at 141. The Congressional presence plainly leaves to state regulation only the smallest possible scope consistent with compelling state objectives.

Those objectives can be met far more precisely than by the present blunderbuss exclusion of alien teachers, despite their personal qualifications, from all schools, at all grade levels, in all subjects. See generally, supra, Point II.D.

IV. EDUCATION LAW § 3001(3) VIOLATES THE DUE PROCESS CLAUSE.

The statute violates the due process clause of the Fourteenth Amendment because it creates an irrebuttable presumption that all non-declarant aliens are not qualified to be teachers, and because it authorizes exceptions to be granted or withheld within the standardless discretion of Appellants.

A. The Statute Impermissibly Creates An Irrebuttable Presumption.

When, as here, constitutionally preferred rights are at stake, this Court has required an individualized determination before the right can be abridged, and has ruled invalid statutory presumptions which preclude the opportunity for individual-

ized determination.[69] This rule against irrebuttable presumptions applies to protect aliens, a suspect class, even when they are not seeking to exercise a fundamental right. See Elkins v. Moreno, ___ U.S. ___, 55 L. Ed. 2d 614 (1978).

Although many aliens, including Appellee Norwick, have taught with distinction and with allegiance to the principles of democracy in New York private schools, and would be superbly qualified teachers in the public schools (see Statement of Facts, and Point III.B.1. supra), they have been denied the opportunity to prove their qualifications and allegiance. In their answer, Appellants "admit that they have not made an individual determination of [Appellees'] competence to teach" except that required by existing law. A 12-13.

The effect of the challenged provision is to create a conclusive and irrebuttable presumption that non-declarant aliens are not qualified to be teachers.

69/ E.g., Vlandis v. Kline, 412 U.S. 441 (1973); Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972).

They are presumed to lack the necessary allegiance to this country (A 34):

> [A]liens who voluntarily refuse naturalization and thereby choose to continue their allegiance to another nation...are not appropriate teachers....

To thus raise the factual issue of allegiance, but to deny permanent resident aliens the opportunity to prove their allegiance, violates the due process clause.

In Vlandis v. Kline, 412 U.S. 441 (1973), this Court held invalid a statutory definition of "resident" which denied to persons seeking to meet its test the opportunity to show factors clearly bearing on the issue. 412 U.S. at 452. The Court reaffirmed the Vlandis rule in Weinberger v. Salfi, 422 U.S. 749, 772 (1975), insofar as a presumption would deny to Appellees the right to prove a fact which the state has put at issue.70/

70/ Distinguishing the statutory scheme before it from the law overturned in Vlandis, the Weinberger Court said: "Unlike the statutory scheme in Vlandis, the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona
(FN 70 continued on next page)

More recently, in Elkins, the Court noted the invalidity of a statute which "purports to be concerned with" a factual issue, but then "denied to one seeking to meet" the statutory test "the opportunity to show factors clearly bearing on that issue." 55 L. Ed. 2d at 625, quoting from Weinberger.

B. The Statutory And Regulatory Scheme Authorize Exceptions Within The Standardless Discretion of Appellants.

If he chooses to do so, Appellant Ambach can authorize any alien to teach. There are no legislative standards to limit his discretion, and the regulatory standards issued by his office are so broad as to

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fides inadmissable." Weinberger v. Salfi, 422 U.S. at 772.

Here, of course, the state has purported to speak in terms of allegiance, e.g., A 34, but forbids Appellees from proving they have such allegiance. Appellees would also prevail under the more difficult rationality standard set forth in Weinberger because the objective criterion here (citizenship or declaration), as has been demonstrated, supra, does not "bear a sufficiently close nexus with the underlying policy objectives" (allegiance), to justify its use as a test for eligibility. Id.

permit unchecked discretion.[71]

"Precision of regulation must be the touchstone" when First Amendment or other fundamental rights are at stake. Keyishian, 385 U.S. at 603-604, quoting NAACP v. Button, 371 U.S. 415 (1965); U.S. v. Robel, 389 U.S. 258, 274-275 (1967) (Brennan, J., concurring). The Court has repeatedly struck down schemes in which state officials had unchecked discretion to decide whose views were acceptable and entitled to be heard. E.g., Niemotko v. Maryland, 340 U.S. 268, 271-272 (1951); Cox v. Louisiana, 379 U.S. 536, 557-558 (1965); South Eastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975); Kunz v. New York, 340 U.S. 290, 294 (1951). Such arrangements are overbroad because they permit officials to achieve indirectly, through selective enforcement, censorship that would clearly be unconstitutional if achieved directly. The liklihood of

71/ The absence of legislative standards impermissibly allows an "isolated segment" of government to subject a disadvantaged class to arbitrary and additional disadvantages. See note 32 supra and accompanying text.

selective enforcement is particularly apparent where, as here, the state asserts as its very interest a test of political acceptability.

Appellants "may" issue certificates to aliens unable to become declarants (i.e., any alien who is not a permanent resident), 8 N.Y.C.R.R. 80.2(i)(2), or possessing skills or competencies not readily available, 8 N.Y.C.R.R. 80.2(i)(1).[72] There are no standards to guide the exercise of their discretion. Such license, in a field so directly affecting a suspect class, academic freedom, and the right to work in the common occupations of the community, is not constitutionally permissible.

72/ As noted supra Point III.B.1., since 1976, the federal government has determined that aliens admitted for the purpose of teaching have skills or competencies superior to those of available teachers already present. If applied consistenly with that federal determination, § 80.2(i)(1) would authorize the employment of permanent resident alien teachers. Instead, Appellants inform us that it is not applied at all. Appellants' Brief at 7 and 28.

V. REMAND FOR AN EVIDENTIARY HEARING IS NOT REQUIRED.

Appellants have stipulated that in all respects except alienage, Appellees are qualified to teach in public schools. A 25; A 35. At the oral argument on Appellees' motion for summary judgment, counsel for Appellants expressly stated she was not aware of any fact that would prevent disposing of the case on summary judgment, did not dispute the material facts specificied by Appellees pursuant to a local court rule, and thought summary judgment was appropriate, though for Appellants, not for Appellees.[73/] Almost ten weeks thereafter, Appellants filed an offer of proof. A 33-34. The Court did not reject the offer of proof. Compare, Appellants' Brief at 32. Instead, the court accepted the offer of proof but found as a matter of law that it was insufficient, even if believed, to preclude summary judgment for Appellees. A 47-48.

Accordingly, a remand for an evidentiary hearing is not necessary. However, should the Court conclude that § 3001(3) is not on its face unconstitutional as a matter of law, Appellees would respectfully request an opportunity for an evidentiary hearing to demonstrate that the statute is, as applied to them, unconstitutional.

73/ Transcript of oral argument on February 11, 1976, pp. 29-30.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED

Dated: New York, New York
September 5, 1978

Respectfully submitted,

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